A

APT ASSOCIATES SDN BHD v. ADNAN ISHAK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[SUIT NO: S-22-909-2008]
19 FEBRUARY 2016

B

CONTRACT: *Performance – Agreement – Sale and purchase agreements signed in 2000 and 2001 – Agreement said to be completed and balance purchase price triggered once specific events completed – Purchaser gave notice to vendor to complete contract seven years later even though specific events still had not materialised – Whether there was rationale for fast-forwarding completion of agreement – Whether parties released and discharged from obligations to perform agreement*

C

CONTRACT: *Uncertainty – Terms – Sale and purchase agreement – Completion date of agreement event-based and uncertain – Agreement said to be completed and balance purchase price triggered once specific events completed – Whether it was known when or whether event would take place – Whether agreement void for uncertainty – Whether possible to perform contract – Whether curable – Whether new time frame could be fixed to complete agreement – Contracts Act 1950, s. 30*

D

CONTRACT: *Void contract – Uncertainty – Sale and purchase agreement contained uncertain terms – Date of completion not specified – Completion date of agreement event-based and uncertain – Agreement said to be completed and balance purchase price triggered once specific events completed – Whether it was known when or whether event would take place – Whether curable – Whether possible to perform contract – Whether new time frame could be fixed to complete agreement that was previously event-based – Contracts Act 1950, s. 30*

E

F

This case concerned a piece of land ('the land') registered in the names of 85 proprietors. 31 proprietors had signed an option to purchase ('OTP') with one Mr Amit who then assigned his rights in the OTP to the plaintiff. The 31 proprietors signed a sale and purchase agreement ('SPA') with the plaintiff between February 2001 and May 2002, for the sale of their respective undivided shares of the whole said land for a purchase price of RM2,000,500. The SPA contained a clause that reads 'the vendor agrees, covenants and undertakes to procure the consensus and consent and to ensure that all other registered co-owners shall transfer their respective shares to the purchaser or its nominees'. The SPA further stipulated that other than the payment of 10% of the purchase price for the respective undivided shares of the owners who signed the SPAs, the balance 90% would only be paid within 90 days upon the happening of certain four events ('the four events'). In 2007, the plaintiff, as purchaser, gave the vendors a three-months' notice and a further extension of two months till 31 August 2007 to procure the rest of the registered owners to execute the OTP and/or SPA. The Government had acquired the whole of the said land and this fact was known by the

G

H

I

parties. The plaintiff tendered payments of the cheques for the balance purchase price but the same was not accepted by the vendors. This prompted the plaintiff to initiate an action against the 20 defendants herein ('the original defendants'). While some of the original defendants entered into settlement or consent order, the 13th and 19th defendants proceeded with trial ('the defendants'). The plaintiff claimed for damages to be assessed for loss of opportunity to receive and to share in the compensation sum. In objecting against the claim, the defendants argued that (i) the SPA was uncertain in respect to the completion date, that the contract was impossible of performance by the defendants and the terms were unreasonable and unconscionable; and (ii) the plaintiff had not come with clean hands and had proceeded in bad faith to tender payment of the balance purchase price, having come to know of the Government's acquisition of the said land and intending to reap a windfall from the compensation award. The issues that arose for the court's determination were (i) whether the contract was void for uncertainty; (ii) whether more than a reasonable time had passed for the conditions to be fulfilled by the defendants; and (iii) whether the contract became impossible to be performed by the defendants after the land acquisition by the Government.

Held (dismissing appeal):

(1) Section 30 of the Contracts Act 1950 provides that agreements may be void either because its meaning is uncertain or that it is not capable of being made certain. Like all SPAs for land, the completion date must be certain otherwise one would not be in a position to determine if the time of completion is up and whether the balance purchase price should then be paid. In the SPAs between the plaintiff and the defendants, one of the four events might trigger the payment of the balance purchase price and with that, the completion of the agreement. However, it is not known when these events might take place and whether it would take place at all. (paras 15, 16 & 17)

(2) The completion date was clearly uncertain, being pegged to events that were even more uncertain, rendering the SPAs with the defendants void for uncertainty. On this ground alone, the plaintiff's claim for damages for the loss of opportunity would fall flatly. The SPAs being void, the plaintiff could not premise and pursue any claim for damages based on it. (paras 35 & 36)

(3) The court could not re-write the terms of a contract that suffers from infirmity of uncertainty when the parties could not agree. It is a kind of infirmity that is incurable. The plaintiff who had equally been silent after the SPAs were signed could not suddenly wake up from its stupor and spring into action by now stipulating that the original defendants must now fulfil the four conditions for payment within three months with a two-months' extension with the deadline being fixed. An

agreement that is uncertain at the point it was made could not be remedied by one party, in this case the purchaser, by it unilaterally introducing a fixed timeframe to complete the agreement when previously it was event-based. (paras 30 & 31)

(4) Nothing happened after the SPA was signed in 2000 and 2001 for the defendants, respectively. All of a sudden, in 2007, the plaintiff gave the defendants' solicitors three months with two months' extension to complete the agreement. The plaintiff had no rhyme or reason nor rationale for fast-forwarding the completion of the SPA in 2007 if not for the fact that it wanted the windfall that would come from the acquisition. A period of some six to seven years of passage of time from the dates of the SPAs of the defendants for the plaintiff/purchaser to now demand completion was unreasonable as more than a reasonable time had passed from the time the agreements were executed. Once a reasonable time had passed, both parties are released and discharged from their obligations to perform the contract. (paras 42, 43 & 57)

(5) Once the Government had acquired the said land inclusive of the undivided shares of the other owners who had not signed any SPA with the plaintiff, there was no longer any land for these owners to dispose of. It would not help the plaintiff at all, when tendering the payment of the balance purchase price, to still hold the defendants to the requirement that they must fulfil their obligations in the SPAs. After it was clear that compulsory acquisition had been confirmed, it had become impossible for the defendants to fulfil their last obligation in getting all the rest of the registered owners to execute the SPA, much less to get the last registered owner to sign. (paras 61 & 66)

Case(s) referred to:

Che Ah and Che Yang Kelsom v. Che Ahmad [1940] 1 LNS 12 HC ***(refd)***

Gan Khay Beng & Ors v. Ng Lit Cheng & Ors [1982] CLJ 146; [1982] CLJ (Rep) 10 PC ***(refd)***

Lee Seng Hock v. Fatimah Zain [1996] 4 CLJ 519 CA ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd [2013] 9 CLJ 111 CA ***(refd)***

Wisma Sime Darby Sdn Bhd v. Wilson Parking Malaysia Sdn Bhd [1996] 4 CLJ 194 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 30, 47, 57(1), (2), 66

Land Acquisition Act 1960, s. 4

Probate and Administration Act 1959, s. 60(3)

For the plaintiff - Francis Goh; M/s Francis Goh & Co

For the 13th & 19th defendants - Baharuddin Ali (Mohd Hafiz with him); M/s Nor Fairoz Ali & Co

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng J:

[1] There was a piece of agricultural land near to Jalan Pahang in Setapak, Kuala Lumpur of about 1.3 hectares. It was held under GM 1748, Lot 275, Mukim Bandar Kuala Lumpur, Tempat Batu 3, Setapak, Wilayah Persekutuan Kuala Lumpur (the said land). It was registered in the names of about 85 proprietors; most of them senior citizens. From the undivided shares of the whole of registered proprietorships owned by each proprietor expressed in fractions on the title, it can be surmised that the whole piece of the said land had been passed down from their forbears to the current owners. Some of them have died and so some have the names of their personal representatives registered against the deceased's undivided share. Almost all the registered proprietors are Malays.

[2] Some 31 of the proprietors were prepared to and did sign an option to purchase ("OTP") dated 18 November 2000 with one Mr Amit Chhabra a/l Ashok Kumar Chhabra (Mr Amit) to sell the said land for RM2,000,500. Later on 20 November 2000, Mr Amit assigned his rights in the OTP to the plaintiff. Basically, the 31 proprietors warranted and represented to Mr Amit that all the registered proprietors had agreed to sell their respective undivided shares in the said land to Mr Amit or his nominee for the said purchase price and further that all the registered proprietors had agreed jointly and severally to sign the OTP with the plaintiff. The rest of the 54 proprietors did not sign the OTP.

[3] Be that as it may the 31 proprietors proceeded to sign a sale and purchase agreement with the plaintiff for the sale of their respective undivided shares of the whole of the said land for a purchase price of RM2,000,500. The 31 proprietors will of course only be paid based on their portion of the undivided share. The various sale and purchase agreements were signed with each of the 31 proprietors between February 2001 and May 2002.

Problem

[4] The sale and purchase agreements executed contained a clause that reads: "The vendor agrees covenants and undertakes to procure the consensus and consent and to ensure that all other registered co-owners shall transfer their respective shares to the purchaser or its nominees". The problem endemic in the sale of such a land where the majority have not signed the OTP nor the sale and purchase agreement and where some of the registered owners have died was peculiarly addressed in the completion clause. It was provided that other than the payment of 10% of the purchase price for the respective undivided shares of the owners who signed the sale and purchase agreements, the balance 90% will only be paid within 90 days upon the happening of the last of four events.

[5] The four events are: (a) upon letter of administration having been taken for any registered owner who is deceased or probate as the case may be; (b) upon a court order pursuant to s. 60(3) of the Probate and Administration Act 1959 having been granted for the approval and consent to transfer by any personal representative or executors; (c) upon the date the last registered owner having executed the sale and purchase agreement to transfer his undivided shares to the purchaser and; (d) upon the vendors' solicitors written confirmation that the original issue document of title is in their possession.

[6] Nothing happened after the sales and purchase agreements were signed with the 31 proprietors; not from the evidence adduced at least. On 28 March 2007, the plaintiff as purchaser, wrote to the vendors' solicitors Messrs Khalek Awang & Associates ("KAA") and gave to the vendors a three months' notice and a further extension of two months till 31 August 2007 to procure the rest of the registered owners to execute the OTP and/or sale and purchase agreement.

[7] The plaintiff tendered payments of the cheques for the balance purchase price by cheques dated 20 and 23 November 2007 (pp. 13 to 21 bundle B2). The question may be asked why the plaintiff was so keen as to fast forward the completion date even before the last of the four events have been fulfilled, if at all it is capable of fulfilment without being overtaken by any one of the four events. It transpired that the Government had acquired the whole of the said land and by the date the balance purchase price was tendered for payment, the fact of acquisition was already known by the parties.

[8] The balance purchase price was not accepted by the vendors. The plaintiff as purchaser threatened to sue. The plaintiff and some of the vendors managed to settle. The plaintiff sued 20 defendants here who could not settle with them. Finally, the plaintiff and the other defendants entered into some settlement or consent order. This case went for trial only with respect to the 13th defendant (D13) and the 19th defendant (D19). They shall sometime be referred to as the "defendants" or sometimes the "two defendants" for emphasis as opposed to the rest of the defendants who shall be referred to as the "original defendants".

[9] The undivided share of D13 and D19 was 1/72 each. D19 had died and both plaintiff and the defendant had agreed to the name of her personal representative to be substituted therefor at the case management before trial. The total purchase price of D13 and D19 based on their undivided shares was RM27,784.54 for each of them (pp. 25 to 46 and 69 to 90 bundle B1). The sale and purchase agreements for D13 and D19 were dated 23 February 2001 and 20 May 2002 respectively. Only 10% of the said purchase price was paid to the defendants' solicitors KAA upon the signing of the respective sale and purchase agreements.

Pleadings And Prayers

[10] The plaintiff is claiming damages to be assessed for loss of opportunity to receive and share in the compensation sum and to challenge the reasonableness of the award given with respect to the other undivided shares not signed by the other co-proprietors as a direct result of the breach of D13 and D19 of the sale and purchase agreement in that they had failed to get them to sign their respective sale and purchase agreements with the plaintiff. The plaintiff contended that the loss of opportunity was within the contemplation of the defendants. The relevant particulars are as found in para. 42 of the statement of claim.

[11] For clarity and the avoidance of doubt, the plaintiff in its submissions had stated at para. H1 that it is not claiming that it is entitled to the compensation award granted by the Land Administrator or for that matter the increased award given by the High Court upon a reference from the decision of the Land Administrator.

[12] For completeness, the High Court in 15NCVC-2-02/2013 in a reference from the Land Administrator on the issue of the quantum of the award and the person entitled to the award, had increased the award to the registered owners by another 50% and that the plaintiff was not amongst the persons entitled to this increase in the award. The award obtained by the plaintiff as given by the Land Administrator was the sum equivalent to the 10% of the purchase price that it had paid the various vendors under the sale and purchase agreements entered into with the individual owners. The award of the defendants given by the Land Administrator based on their 1/72 portion was RM 92,806.47 each as compared to the purchase price of a mere RM27,784.54 each. Whereas, the contracted purchase price for the whole of the said land was RM2,000,500 that which was awarded by the Land Administrator as compensation for the said land was RM6,882,114 as can be seen from the order of the Land Administrator at p. 43 of bundle C. It was based on RM100 per square foot.

[13] It was submitted with considerable force by the defendants that this suit is an attempt by the plaintiff to get at what they had failed to obtain in the land reference, ie, its entitlement to the whole compensation sum payable to the original defendants or for that matter, whatever is meant by the loss of opportunity arising out of its failure to obtain the compensation sum awarded to the other registered owners who did not sign a sale and purchase agreement with it; all caused by the failure of the two defendants here to honour their warranty and undertaking that they would, jointly and severally with the other owners who did sign the sale and purchase agreement, get the rest of the owners to so sign the sale and purchase agreement with the plaintiff.

[14] The defence of the defendants as pleaded was that the agreement was uncertain with respect to the completion date and that the contract was impossible of performance by the defendants and the terms unreasonable and

unconscionable. Further, it was contended that the plaintiff had not come with clean hands and had proceeded in bad faith to tender payment of the balance purchase price, having come to know of the government's acquisition of the said land and intending to reap a windfall from the compensation award which would doubtless be based on the then current market price and not the price negotiated with the defendants in 2001/2.

Principles

Whether The Contract Is Void For Uncertainty

[15] Section 30 of the Contracts Act 1950 provides that agreements may be void either because its meaning is uncertain or that it is not capable of being made certain. Section 30 reads as follows:

> Agreements void for uncertainty
>
> 30. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[16] Like all sale and purchase agreements for land, the completion date must be certain otherwise one would not be in a position to determine if the time of completion is up and whether the balance purchase price should then be paid. The crux of the matter is the uncertainty with respect to the fulfilment of the conditions for completion of the sale and purchase agreement.

[17] In the sale and purchase agreements between the plaintiff and the defendants, whilst we know that one of the four events mentioned in the completion date clause may trigger the payment of the balance purchase price and with that the completion of the agreement, we are totally lost as to when these events may take place and whether it would take place at all for one would have to wait for the last of the four cumulative events to happen.

[18] Thus while completion is event-based and there is nothing wrong with that, there is no certainty as to when these events may take place. It is event-based conditions with the last condition being the triggering condition for payment of balance 90% of the purchase price.

[19] However, some six years had passed since the agreement was signed for the sale and purchase of the defendants' undivided share in the said land. There were some 54 registered owners who had not signed the sale and purchase agreements and the defendants together with those who signed had warranted and undertaken that they will get all the rest to sign.

[20] No time frame was fixed for getting all the rest to sign including the last person. There was also the anticipation that some owners might die before the conditions are fulfilled for they were said to be senior citizens and so there was also a condition that letters of administration or probate as the case may be should have been taken out for the deceased's estate. Most of the registered owners are Malays and there was anticipated the need to obtain

the Sijil Faraid from the Kathi's office on proportion to distribute a deceased person's undivided share in a land before applying for the necessary order of court under s. 60(3) of the Probate and Administration Act 1959 for the approval and consent to transfer by any personal representative or executor of the beneficiaries' undivided share to a third party.

[21] Indeed from the documents exhibited at pp. 83 to 93 of bundle C2 which is the Form H notice of award and offer of compensation sent out by the Land Administrator dated 5 February 2008, we can see from the list of names of persons having interest that 18 of the proprietors of the said land had died. The fact that many of them are senior citizens can be gathered from the identification cards numbers written below their names in the said Form H.

[22] Further, apparently nobody quite know where the issue document of title to the said land was kept and no evidence was given by the parties on this and hence the condition to be fulfilled ie, "upon the vendors' solicitors written confirmation that the original issue document of title is in their possession". Presumably it had gone missing for in D13's letter of appointment of solicitors dated 22 December 2000 (exh. D17) she had authorised KAA to make a police report on the misplaced or stolen issue document of title.

[23] All these conditions are set out in part 11 of the first schedule to the sale and purchase agreement and identical conditions are found also in part 8 of the first schedule on the "Manner and Time of Payment" and are reproduced below:

> Completion Date
>
> 10% of the total purchase price shall be paid upon signing the Sale and Purchase Agreement and the balance 90% to be paid within 90 (ninety) days from:
>
> EITHER:
>
> (a) Upon letter of administration having taken for any registered owner who is deceased or Probate having been taken for any registered owners; and
>
> (b) Upon Court's Order pursuant to Section 60(3) Probate Administration 1959 having been granted for the approval and consent to transfer by any personal representative or executors (as the case may be); or
>
> (c) Upon the date for the last registered owner having executed the sale and purchase agreement to transfer his/her/their respective portion of shares to the Purchaser; or
>
> (d) Upon vendors solicitors written confirmation that the original issue document of title is in their possession, whichever of (a), (b), (c), and (d) shall be last to occur.

[24] There was also the "Special Express Conditions" in the second schedule to the sale and purchase agreement that reads:

> Notwithstanding anything to the contrary herein contained:
>
> 1. The vendor agrees undertakes and covenants that he/she shall take all necessary steps to procure a new individual Issued Document of Title from the relevant Land Registry.
> 2. The vendor agrees to execute a Power of Attorney in favour of the purchaser or their nominees.
> 3. The Vendor agrees covenants and undertakes to procure the consensus and consent and to ensure that all other registered owner shall transfer their respective shares to the Purchaser or their nominees.

[25] Learned counsel for the plaintiff, Mr Francis Goh, conceded that if the plaintiff did not tender the payment of the balance purchase price on that fateful date in November 2007, he could still wait another five or ten or even longer than that and he could still complete after the last of the four events have happened. That to me can only underscore the point that the contract was void for uncertainty. One cannot suffer an agreement with no completion date in sight extending to an indeterminate date and stretching it to infinity, or perhaps eternity.

[26] Already at the point when the suit was commenced in 2008, two out of the 20 defendants had died namely D14 and D19. They had been substituted by the name of their personal representative. As most of the registered owners are senior citizens, one can only expect that with the passage of time, in the natural progression of human life and lot, more and more would pass away. While that alone by itself may not render an agreement void for uncertainty, the combined effect, of 85 registered owners with only 31 having signed the sale and purchase agreement with the plaintiff and the 31 having agreed to procure the remaining 54 to sign the agreement, can only mean the uncertainty would be escalated many times over.

[27] Imagine for a moment one registered owner amongst the 54 who had not signed the sale and purchase agreement, having died after the 31 had signed their agreement; there would be no one to represent him until a personal representative is appointed by the court and the deceased undivided share not being transferable until a court order is obtained sanctioning the sale. Indeed, there would be no one who could sign the sale and purchase agreement until the court has granted an order for letters of administration or probate to the deceased's estate and the same has been extracted. Then, there is a separate application to be made to the court for the sale of the deceased's land to the plaintiff in this case and if there is minority interests in the deceased's estate, then there is a need for the personal representative to produce a valuation report to show that the purchase price is at least

comparable to the market value. As decided by the Court of Appeal in *Che Ah and Che Yang Kelsom v. Che Ahmad* [1940] 1 LNS 12; [1941] MLJ 105 the court is under a duty to ensure that the land is sold at the best price in the interest of the beneficiaries. One can only sigh that with each passing year, the market price can only be higher and higher compared to the price at which the 31 proprietors signed the sale and purchase agreements. There is a real likelihood that the court may not approve the sale. As was observed by Lord Russel in the Privy Council case of *Gan Khay Beng & Ors v. Ng Lit Cheng & Ors* [1982] CLJ 146; [1982] CLJ (Rep) 10; [1982] 1 MLJ 163, a purchaser takes his chance of a contract not being approved by the court.

[28] That is already assuming that the other beneficiaries who are major, consent to the sale of his portion to the plaintiff at the same price at which the 31 proprietors had agreed to sell their portion to the plaintiff. Little wonder that conditions (a) and (b) above are conjunctive; it is "both and" and not "either or".

[29] With each passing year, one can only expect more uncertainty to be introduced for the obvious certainty that people do die and more so when they are already old. One need not be a mathematician to appreciate the permutations possible with the peculiarities and propensities of being human that can only aggravate the uncertainty with the passage of time.

[30] The court cannot rewrite the terms of a contract that suffers from the infirmity of uncertainty when the parties could not agree. It is the kind of infirmity that is incurable. The plaintiff who had equally been silent after the sale and purchased agreements were signed with the 31 registered owners around the year 2000 and 2001, cannot suddenly wake up from its stupor and spring into action by now stipulating on 28 March 2007 that the defendants as originally sued must now fulfil the four conditions for payment within three months with a two months' extension with the deadline being fixed on 31 August 2007 (pp. 11 to 12 bundle B2). The reason given is that the plaintiff is now ready to complete the agreement even though the last of the four events have not happened yet.

[31] The payment of the balance purchase price was rejected by the vendors' solicitors. An agreement that is uncertain at the point it was made cannot be remedied by one party, in this case the purchaser, by it unilaterally introducing a fixed time frame to complete the agreement when previously it was event-based, awaiting the fulfilment of the last of the four events agreed upon.

[32] In *Wisma Sime Darby Sdn Bhd v. Wilson Parking Malaysia Sdn Bhd* [1996] 4 CLJ 194 at p. 208; [1996] 2 MLJ 81 at p. 93, the Court of Appeal speaking through His Lordship VC George JCA observed that the agreement itself must provide the machinery or some formula which the court can utilise to ascertain what is otherwise unascertainable without the parties coming to an agreement. His Lordship reiterated that the courts will not lend

their aid to the enforcement of an incomplete agreement. There the Court of Appeal struck down an option clause to renew the tenancy agreement for being void for uncertainty as it was subject to 'a rent to be agreed' and there was no machinery to ascertain the rent in a case where the parties could not agree on the rent for the renewed tenancy.

[33] The Court of Appeal case of *Saw Siew Tuan v. Omicrast Manufacturers Sdn Bhd* [2013] 9 CLJ 111; [2013] MLJU 658 is equally instructive. There the sale of the land was subjected to the approval of the relevant authorities and that the balance purchase price was to be paid within two months "from the date of receipt by the vendor of the document of title in respect of the said property and the necessary approval for transfer (if any) in favour of the purchaser whichever is later". Appreciating that the completion of the contract was predicated upon the occurrence of certain events, the Court of Appeal nevertheless had no compunction in concluding that the completion of the contract was uncertain and that the sale and purchase agreement was thus void for uncertainty under s. 30 of the Contracts Act 1950. The Court of Appeal couched its conclusion as follows:

> [8] It was provided by clause 3 of the preamble to the SPA that the sale of the Property was subject to the approval from the relevant authorities being obtained. The SPA provided further that the balance purchase price was to be paid to the appellant's stakeholders within two months "from the date of receipt by the Vendor of the document of title in respect of the said Property and the necessary approval for transfer (if any) in favour of the Purchaser whichever is later". Thus completion of the contract between the appellant and the respondent was predicated on the occurrence of certain events. Taking into consideration the fact that at the material time the appellant had no good title to the Property and the fact that the SPA did not provide for any time period for the appellant to obtain approval for alienation of the Property in her favour, and considering the fact that there was no certainty that the State Authority would approve the appellant's application (*North East Plantations Sdn Bhd v. Pentadbir Tanah Daerah Dungun & Anor*, *supra*), we agreed with learned counsel for the appellant that the completion of the sale and purchase transaction was uncertain and therefore the SPA was void for uncertainty (s. 30 Contracts Act 1950). For the reasons stated we allowed the appeal and set aside the decision of the High Court.

[34] The plaintiff had pointed out quite astutely, that the two defendants have not shown what efforts they have taken to get the remaining registered owners to sign the sale and purchase agreement. Here is a case where if an agreement is void for uncertainty at the outset, there is no obligation on the part of the two defendants to show that they have done something but failed in the final outcome. D13 is a feeble and frail woman of 84 years old; her bent frame could hardly support her walk and her speech was hardly audible. D19 had passed on before the agreement was dated and it was only at the case management before me that parties agreed to substitute one of her children as her personal representative in the suit.

[35] Looking at the whole circumstances of this case, I would say that the completion date is clearly uncertain being pegged to events that are even more uncertain rendering the sale and purchase agreements with the two defendants void for uncertainty.

[36] On this ground alone, the plaintiff's claim for damages for the loss of opportunity in having a share in the compensation paid out to the other registered owners who did not sign the sale and purchase agreement with the plaintiff, would fail flatly. The sale and purchase agreements being void, the plaintiff cannot premise and pursue any claim for damages based on it.

[37] The plaintiff is entitled to receive a refund of all monies paid under a void contract. Under s. 66 of the Contracts Act 1950 it is provided as follows:

> Obligation of person who has received advantage under void agreement, or contract that becomes void
>
> 66. When an agreement is discovered to be **void**, or when a contract becomes void, **any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it**
>
> (emphasis added)

[38] Here it is an agreed fact that the Land Administrator had awarded a compensation to the plaintiff based on the 10% of the purchase price paid. It cannot be disputed that what had been offered to the plaintiff as compensation was deducted from what the defendants would have been ordinarily entitled to. In other words, the defendants' share of the compensation was reduced by so much of the sum, here equivalent to 10% of the purchase price paid to the defendants, as was awarded to the plaintiff. Reference is made to p. 43 para. 2 of the order of the Land Administrator in bundle C2. The plaintiff had thus received back their 10% of the purchase price though through the channel of the Land Administrator. The plaintiff appealed to the High Court both on quantum and on the parties entitled to receive the award but it failed in the appeal. The matter rested there.

[39] As for the claim here, the plaintiff had clarified through its learned counsel that it is not claiming that it is entitled to what the defendants had received as compensation award for their undivided shares in the said land the whole of which had been acquired by the Government.

Whether More Than A Reasonable Time Had Passed For The Conditions To Be Fulfilled By The Defendants

[40] Assuming for a moment that I had been wrong and that there was nothing uncertain about the contract in that one could visualise the four events triggering completion happening finally except that one is not quite

A sure when these events and with that the last event, would take place, the question then is whether more than a reasonable time had passed for the conditions governing completion to be fulfilled by the defendants.

[41] The question is relevant because of s. 47 of the Contracts Act 1950 which provided as follows:

B

> Time for performance of promise where no application is to be made and no time is specified.
>
> 47. Where, by the contract, **a promisor is to perform his promise** without application by the promisee, and **no time for performance is specified**, the engagement must be **performed within a reasonable time**.
>
> C
>
> (emphasis added)

[42] Nothing happened after the sale and purchase agreement was signed in 2000 and 2001 for D13 and D19 respectively. The plaintiff would like us to believe that from time to time they had contacted the vendors who had D signed the sale and purchase agreements with respect to the progress in the compliance with the conditions imposed for the completion of the agreement. However, there were no witnesses called on this though the court was told by learned counsel for the plaintiff that the rest of those who had signed the agreement including the rest of the 18 original defendants have E settled with the plaintiff. The plaintiff being represented by solicitors would have instructed their solicitors to write to the defendants' solicitors on this but no letters were produced other than the fateful letter of 28 March 2007 giving notice to the defendants to complete the agreement and the letters thereafter. Even if the plaintiff did not want to trouble its solicitors on this, F surely it must be able to produce letters that it had personally written to the defendants after the sale and purchase agreements were signed in 2000 and 2001. However, not a single letter was produced. In all probabilities, nothing happened between the plaintiff and the defendants until the fateful letter of 28 March 2007 from the plaintiff to the defendants fixing 31 August 2007 as the deadline for the completion of the agreement.

G

[43] All of a sudden, on 28 March 2007 the plaintiff wrote to the defendants' solicitors giving them three months with two months' extension to complete the agreement. Soon after that, the declaration of intended acquisition in Form D under the Land Acquisition Act 1960 was gazetted on 11 June 2007. H See pp. 59 to 61 of bundle C2. The whole piece of the said land was to be acquired for the Duta-Ulu Klang highway project ("Duke Highway Project"). The notice of enquiry in Form E dated 5 July 2007 was sent out by the Land Administrator to the registered owners and all caveators including the plaintiff.

[44] The defendants submitted that the plaintiff had all of a sudden decided I to fast-forward completion because they wanted to be able to enjoy the benefits of the compensation. The plaintiff would want the court to believe that it was clueless as to the land acquisition when it issued the letter of 28 March 2007

giving what it said was a reasonable time for the defendants to fulfil the conditions for completion. On the contrary, the sequence of events that unfolded militates against that. There is no rational basis for the plaintiff to rush to completion when its solicitors have yet to obtain the issue document of title from the defendants or whoever might be keeping it or a replacement title if it had gone missing. Without that, it be foolhardy and throwing caution to the wind and indeed assuming unnecessary risk to pay the balance purchase price without the title in the possession of one's solicitors. The solicitor handling the transaction for the plaintiff (DW4) testified in court but never once did he mention that the title had been delivered to his firm. The reason was obvious; with the land acquisition who would need the title anymore? What would be necessary was to show tender of the balance purchase price and with that one becomes the beneficial owner and the registered owners who had signed the sale and purchase agreements, mere bare trustees for the plaintiff. Hence, any compensation sum would rightly have to be held in trust for the plaintiff even if paid to the defendants. More than that the plaintiff reckoned it would be in a position to claim for damages arising from the failure of the defendants to complete the agreement and that would be the loss of opportunity to claim the compensation award given to the 54 registered owners whom the defendants failed to procure their signing the sale and purchase agreement with the plaintiff.

[45] How about the *sine quo non* of the sale and purchase agreements signed with the defendants as reflected in the completion clause in that all must sign the sale and purchase agreement for the whole of the said land and until and unless that has happened, the plaintiff is not legally obliged to pay the balance purchase price? The answer is only too obvious: with the acquisition it would no longer be necessary to purchase the undivided shares of the other registered owners but that it can try to stake a claim still for the loss of opportunity to enjoy a share of the compensation award paid to the other registered owners.

[46] At the risk of repetition, the plaintiff's claim is not a claim for damages for not being able to get a share of what was paid to the defendants as compensation award but damages to be assessed for the loss of opportunity to receive the compensation award paid to the other registered owners who did not sign the sale and purchase agreement with the plaintiff in spite of the defendants warranting that they would get them to do so.

[47] Admittedly, if the plaintiff cannot legally claim the compensation award granted by the Land Administrator and later increased by the High Court on a reference from the Land Administrator, how is it then able to get damages for loss of opportunity to participate in and profit from the compensation award given to the other registered owners? If the plaintiff had failed at the stage of better entitlement against the defendants, how is it to succeed at the more remote stage of claiming against the defendants for damages arising out of the so-called breach by the defendants in honouring the agreement?

[48] I do not believe the plaintiff when through its managing director Mr Amit PW1, it informed this court that it was unaware of the acquisition. By his own testimony, he received the notice of enquiry of the acquisition on 8 August 2007 but that he did not understand what the notice was all about. Judging by his flair in and fluency of the Bahasa Malaysia language that he used in his testimony in court, I could only say that his usage of the language was quite flawless. It was a simple notice of enquiry of an intended acquisition and stating the time, date and place of the hearing of all parties that have an interest in the said land. The hearing date was fixed on 7 August 2007. As a matter of practice, the Land Office would send to all caveators of a land the subject matter of an intended acquisition by the Government. Even giving the benefit of the doubt to him, it would be most reasonable to expect him to get someone who understands the language better to explain to him. At any rate, he did attend the subsequent hearings before the Land Administrator though he missed the first preliminary hearing. He was partly to be blamed because the registered office stated in the plaintiff's caveat entry form had changed and the plaintiff had not informed the Land Office about it. The long and short of the matter was that by the time the cheques were made out and dated 28 November 2007, the fact of the compulsory land acquisition was known to all interested to know.

[49] It is not disputed that the acquisition of the said land was for the Duke Highway Project. The court can take judicial notice of where the highway passes through. In line with the Government's initiative to engage all stakeholders including registered owners of lands to be acquired for such a massive highway project of public interest, one would have expected opportunities available for the public to inspect the master plan of Kuala Lumpur for instance and for land surveys to have been done before with opportunities given to all who might be affected to put in their objections and representations. The court can take cognisance of the fact that those who intend to buy land for development would be in the know as to where a highway might be located.

[50] The scheme of compulsory land acquisition under the Land Acquisition Act 1960 is such that before the *Gazette* notification of Form D of a notice of intended acquisition there is first a preliminary notice under s. 4 of the Act where a notification in Form A notice that land is likely to be acquired will be gazetted. Under para. 2 of the said notice, it is stated that persons authorised by the State Director may enter the land to examine it and to undertake survey operations. The things that may be done on the land by these persons authorised to enter the land are provided for in Form B authority to enter survey. In short, one would expect some activity on the land to be acquired before the *Gazette* notification in Form D declaration of intended acquisition.

[51] To believe the plaintiff's Managing Director that he was oblivious to a possible acquisition affecting the said land in March 2007 goes contrary to the condition set by the plaintiff for the purchase of the said land in that all

must sign the sale and purchase agreement or else the plaintiff is not interested. The way the agreement was crafted with respect to completion was that the plaintiff was prepared to wait for as long as necessary for it had only paid 10% of the purchase price. The purchase price had been locked in such that even if the said land has appreciated the defendants, in the plaintiff's belief, cannot ask for more. What is more, the other registered owners who would eventually sign the sale and purchase agreement have to sell their undivided share at the same price per square foot.

[52] This court found it difficult to believe the officer from the Land Office DW2 who testified that even in this case of a Duke Highway Project, no one would know of any intended acquisition until the declaration of intended acquisition in Form D is gazetted. It would be naive of the court to believe that. It is not unlike the case of Kuala Lumpur International Airport (KLIA) in Sepang, though here it is on a much smaller scale. Once it was known that a new international airport was going to be located in Sepang, those privy to this knowledge had started buying off lands there from village owners and small shareholders, and in due course reaped their windfall. This is not the kind of acquisition where there are merits and value in shrouding it in secrecy until the *Gazette* notification of acquisition is out. It is the kind of project for public interest where a maximum consultation with all who might be affected would be beneficial for all.

[53] This court can take judicial notice of the fact that lands in Kuala Lumpur especially when it is near to a highway can only appreciate in value with the passage of time. Take this said land for instance. The purchase price agreed was RM30 psf when the sale and purchase agreements were signed in the year 2000 and 2001.

[54] The land acquisition price is of course based on the current market value of the said land then and it was awarded at RM100 psf by the Land Office and on reference to the High Court the compensation was increased by another 50% to RM150 psf. There was, looking back, a whopping 400% increase or windfall as learned counsel for the two defendants, Encik Baharuddin Ali, put it.

[55] The question to be determined is whether more than a reasonable time had passed for completion of such an agreement with no price adjustment and with no certainty of completion date.

[56] The plaintiff has no rhyme or reason nor rationale for fast-forwarding the completion of the agreement in 2007 if not for the fact that it wanted the windfall that would come from the acquisition. There is no other plausible reasons for the plaintiff to want to fast-forward the completion when as it is the last of the four events is yet unknown when it will come to pass. The Managing Director of the plaintiff reluctantly admitted this to a question from the court, though through its learned counsel it had clarified that the plaintiff was not claiming for that compensation awarded to the defendants

A but the loss of a chance to share in the compensation awards granted to the other registered owners as the defendants failed to procure them to sign the sale and purchase agreement.

[57] In all the circumstances of the case a period of some six to seven years of passage of time from the dates of the sale and purchase agreements of the B two defendants for the plaintiff/purchaser to now demand completion is unreasonable as more than a reasonable time had passed from the time the agreements were executed. If the plaintiff had wanted to declare the defendants at default, it should have done so long ago before there was any acquisition. Once a reasonable time had passed, both parties are released and C discharged from their obligations to perform the contract.

[58] The plaintiff by its own inaction had allowed the contract to lapse or expire by the passage of a reasonable time and it cannot be unilaterally revived or reinstated by the plaintiff giving a fixed time frame of three months with two months' extension for the defendants to now fulfil the D conditions for completion of the contract. Such a contract would clearly be unconscionable within the principle enunciated by the Court of Appeal in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 and a court of law would not allow its enforcement.

E *Whether The Contract Has Become Impossible To Be Perform By The Defendants After The Land Acquisition By The Government*

[59] Assuming for a moment for the sake of argument that the contract is not void for uncertainty and that it is still within a reasonable time for the defendants to fulfil the conditions stated in the agreement for the payment of F the balance purchase price, then the question that arises would be whether the contract has become impossible of performance now that the Government has acquired the said land in June 2007. It must be borne in the forefront of our mind that the contract entered into was for the rest of the owners to sign the sale and purchase agreement with the plaintiff for them to dispose of their respective undivided shares in the said land at the same G price at which the defendants had contracted to sell to the plaintiff.

[60] Section 57(1) of the Contracts Act 1950 deals with an agreement to do an impossible act. It may be an act that becomes impossible of performance after the contract is made as in s. 57(2). The impossible act is not caused by H the promisor but by a supervening event beyond the control of the promisor. Section 57 reads as follows:

> 57. (1) An agreement to do an act impossible in itself is void.
>
> (2) A contract to do **an act which, after the contract is made, becomes impossible**, or by reason of some event which the promisor I could not prevent, unlawful, **becomes void when the act becomes impossible or unlawful**.
>
> (emphasis added)

[61] Once the Government had acquired the said land inclusive of the undivided shares of the other owners who had not signed any sale and purchase agreements with the plaintiff, there was no longer any land for these owners to dispose of. It does not help the plaintiff at all, when tendering the payment of the balance purchase price, to still hold the defendants to the requirement that they must of necessity fulfil this obligation in the agreement.

[62] The plaintiff by its very own admission through its managing director, said that it received the notice of enquiry from the Land Office in Form E on 8 August 2007. The other registered owners would presumably had received their respective notices around that time. No one in his proper frame of mind would want to dispose of his land at a price fixed some six years ago when the Government that has acquired the said land would be compensating at the current market value at date of the acquisition. The event of acquisition had radically altered the obligation of the defendants to get the remaining owners to sign a sale and purchase agreement with the plaintiff as purchaser. By the time the plaintiff tendered the balance purchase price in November 2007 to complete the sale and purchase agreement, so to speak, the acquisition was *fait accompli*.

[63] If authority is needed, one may refer to the Court of Appeal case of *Lee Seng Hock v. Fatimah Zain* [1996] 4 CLJ 519 at pp. 528-530; [1996] 3 MLJ 665 at pp. 673-674 where it was opined as follows:

> Visu Sinnadurai in his book on the *Law of Contract in Malaysia and Singapore - Cases and Commentary*, had this to say when dealing with the doctrine of frustration at p. 487:
>
> > The Act does not define the word 'impossible'. However, it appears that the wording of the section envisages two main instances of frustration - when a contract to do an act becomes: (a) impossible; or (b) unlawful. It is clear that the frustration should be supervening and subsequent to the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligation.
>
> The applicability of the doctrine was also discussed in the case of *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 where at p. 262, the Federal Court after referring to a number of English authorities, expressed its views of the doctrine in the following manner:
>
> > In short, it would appear that where after a contract has been entered into there is a change of circumstances, but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

Applying that test, it is clear that the compulsory acquisition that occurred in the instant case took place 14 years after the agreement was executed - an event that could not have been contemplated by the parties.

We next ask ourselves whether the acquisition of the land had radically changed the obligation of the respondent to sell the 1/2 share of the land to the appellant. We answer this in the affirmative, as what was agreed and intended by the parties and affirmed by the agreement is a transfer of a 1/2 share of the land from the respondent to the appellant by way of a sale. When the land was compulsorily acquired and compensation awarded, the subject matter of the agreement ceased to exist and performance of the agreement became impossible. For that reason, we consider that the compulsory acquisition of the land had frustrated the agreement so as to discharge both the appellant and the respondent of their obligations under the agreement. That same issue was raised in the Singapore case of *Lim Kim Som v. Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR 393 and when invoking the doctrine of frustration, LP Thean JA had this to say (at p. 409):

> In our judgment (adopting the words of Lord Radcliffe [in *Davis Contractors v. Fareham Urban District Council* [1956] AC 696 at p. 729]) the occurrence of the unexpected event, ie the commencement of the process of compulsory acquisition, had altered fundamentally the 'face of things' and there was such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. In our judgment, this case is an appropriate one for the invocation of the doctrine.

Likewise, since the subject matter of the agreement before us has been taken away and replaced by way of compensation payable, can the appellant claim such compensation as being due and payable to him? We say 'no' for the very reason that the basis of the appellant's claim is dependent on the agreement, but since we have already ruled that such an agreement is now void under s. 57(2) of the Act, the respondent cannot claim any right to such compensation. At most, he is entitled to be refunded the 10% deposit he had paid to the respondent under s. 66 of the Act which provides that any person who has received an advantage under an agreement which is later discovered to be void is obliged to return such advantage or compensate for it to the person he received it. It is for this reason that the appellant is entitled to be refunded the 10% deposit he had made to the respondent pursuant to cl. 1 of the agreement.

(emphasis added)

[64] Whilst it is true that there is a clause in the sale and purchase agreement with the defendants that in the event of an acquisition of the said land by the Government, the plaintiff as purchaser has the option to continue with the purchase and would be entitled to the compensation sum; here we are talking of a compulsory acquisition *vis-a-vis* the obligation of the defendants to get the remaining registered owners to dispose of their undivided shares in the said land to the plaintiff. The supervening event of compulsory land acquisition is such that it is now impossible for the remaining registered

owners to dispose of that which they no longer had. The compulsory acquisition clause in the sale and purchase agreement between the plaintiff as purchaser and the defendants as vendors reads:

> Clause 15 - Compulsory Acquisition
>
> The Vendor(s) hereby warrants to the purchasers that he/she/they is/are not aware and has/have not receive any notice of acquisition of the said property or any part thereof on or before the execution of this Agreement, and it is hereby agreed that after the date of this agreement, in the event of acquisition of the whole or any part of the said property by the appropriate authorities before the Completion Date and/or the Extended Completion Date (whichever the case may be) the vendor shall immediately notify the absolute right but is/are not obliged to rescind this agreement whereupon the vendors shall forthwith within thirty (30) days from the notice of rescission refund free from the interest the full Purchase Price or any part thereof paid by the Purchasers or the Purchaser's Financier (whether to the vendors or the charge) towards the Purchase Price and thereafter this agreement shall be null and void and be of no further effect and neither party hereto shall have any claims against the other save and except for any antecedent breaches. In any event, the purchasers agrees to accept the extent and nature of such acquisition the vendors shall immediately notify the acquiring appropriate authority of the purchasers interest in the said property pursuant to this agreement and the purchasers shall subject to the full payment of the purchase price be absolutely entitled to the compensation paid by the acquiring appropriate authority.

[65] The ratio of the above case is applicable to the plaintiff's claim for a loss of opportunity to participate in the compensation award of the Land Administrator with respect to the other registered owners for which the defendants failed to honour their obligation in getting them to sign a sale and purchase agreement with the plaintiff. There the appellant/plaintiff was claiming their right to the compensation of the 1/4 of the land owned by the defendant/respondent which was acquired by the Government. It was for the compensation sum less the purchase price. It must not be forgotten that because of the many diverse and disparate registered ownership of the said land, the plaintiff's intention was to buy the whole piece of land *en bloc* or not at all. Hence, the condition written into the completion date in part 11 (c) of the first schedule to the sale and purchase agreement as follows:

> (c) Upon the date for the **last registered owner** having been executed the sale and purchase agreement to transfer his/her/their respective portion of shares to the Purchaser; ...
>
> ... **whichever** of a), b), c) and d) **shall be last to occur**.
>
> (emphasis added)

[66] With the tendering of the four cheques for the balance purchase price, which cheques were dated 20 and 23 November 2007 after it was clear that compulsory acquisition had been confirmed, it had become impossible for the defendants to fulfil their last obligation in getting all the rest of the registered owners to execute the sale and purchase agreement, much less to get the last registered owner to sign. To insist on performance by the defendants would be not unlike having a large millstone hung around their neck and being thrown into the sea and yet expecting them to swim to shore.

[67] The plaintiff cannot change the conditions midway through the agreement and unilaterally impose its own terms crafted strategically in its favour knowing full well that it was humanly impossible for the defendants to fulfil such a condition. The plaintiff had no good reason to fast-forward as it were the completion of the agreement other than to receive the compensation award for the whole of the said land. The face and focus of the agreement has changed with the compulsory acquisition of the whole of the said land; its tenor and thrust has been transformed radically such that the defendants are discharged from their obligation to get the rest of the registered owners to execute the sale and purchase agreement. The act of acquisition by the Government was clearly beyond their control and once set in motion, there was no way to get the remaining registered owners to sign the sale and purchase agreement. Once acquisition was completed, there was no longer the subject matter capable of disposal.

Pronouncement

[68] For all the reasons given above, I had dismissed the plaintiff's claim against D13 and D19 with costs of RM30,000 and allocator is to be paid before extraction of the order of costs. The sums still held in the defendants' solicitors account are to be released henceforth to the defendants.

[69] Having held that the sale and purchase agreements are void, the power of attorney granted by the defendants to the plaintiff with respect to each of their undivided shares in the said land, is also void and of no effect.